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# Fourteenth report on reservations to treaties

**By Alain Pellet, Special Rapporteur**

**Addendum**

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# II. Validity of reservations and interpretative declarations (continuation and conclusion)

80. The Special Rapporteur began his study of the validity of reservations and interpretative declarations in 2005 in his tenth report on reservations to treaties.[165] In the second part of this report, he plans to conclude this study, with a view to the full adoption on first reading of part III of the Guide to Practice on the topic "Validity of reservations and interpretative declarations".

81. The Commission has already adopted several draft guidelines in part III.[166] There can be no question of reopening the debate on these draft guidelines, which were adopted following a full discussion of the tenth report on reservations to treaties, nor would it seem useful to reconsider the terminology used in part III, particularly the term "validity", which was approved by the Commission after a lengthy discussion.[167] However, in order to understand the draft guidelines proposed in this report for inclusion in part III of the Guide to Practice, it seems appropriate to recall the context of the issue of the validity of reservations and to briefly review the draft guidelines already adopted by the Commission in 2006 and 2007[166] (A), before addressing the related issue of the validity of reactions to reservations (B). A study of the validity of interpretative declarations is included for the sake of completeness rather than for its practical implications (C). The same is true for the study of the validity of reactions to interpretative declarations (D). The issue of the validity of conditional interpretative declarations will be dealt with in a separate short study (E).

82. The Commission has also already discussed the issues relating to determination of the validity of reservations, which were set forth by the Special Rapporteur in his tenth report.[168] The corresponding draft guidelines were referred by the Commission to the Drafting Committee in 2006[169] but have not yet been adopted by the Committee; it is to be hoped that they will be adopted this year at last. They may need to be supplemented with draft guidelines on determination of the validity of reactions to reservations, of interpretative declarations and of reactions to interpretative declarations (F).

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[165] A/CN.4/558 and Corr.1, Add.1 and Corr.1, and Add.2.

[166] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 104; and ibid., *Sixty-second Session, Supplement No. 10* (A/62/10), para. 47. See also paras. 8 and 23 above.

[167] A/CN.4/SR.2859, pp. 12-13; *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 345. For a summary of the Sixth Committee's discussion of this terminological issue, see the eleventh report on reservations to treaties, A/CN.4/574, paras. 19 to 22.

[168] A/CN.4/558/Add.2. See also above, paras. 5 and 13.

[169] A/CN.4/SR.2859, pp. 12 and 13; *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 103. See also above, para. 7.

83. Draft guidelines 3.3 and 3.3.1, which were proposed by the Special Rapporteur in his tenth report[170] and deal with the consequences of the validity of reservations, have also been referred to the Drafting Committee;[171] it is therefore unnecessary to discuss them further. However, it may be appropriate to consider their place in the Guide to Practice since they relate more to the effects of reservations (or the lack thereof) than to their validity per se.[172]

84. Similarly, in 2006, the Special Rapporteur decided upon reflection that it was doubtless preferable to defer a decision on draft guidelines 3.3.2 to 3.3.4,[173] which also deal with the consequences of the (non-)validity of a reservation, until the Commission had considered the effects of reservations.[174] Accordingly, the Commission has not yet taken any action on these draft guidelines. They should be included in part IV of the Guide to Practice, on the effects of reservations and interpretative declarations, and will be considered again in the third part of this report.

## A. Validity of reservations (background)

85. Part III of the Guide to Practice begins with a study of the issue of the substantive validity of reservations. It does not consider the consequences of the

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[170] A/CN.4/588/Add.2, paras. 181-194. The text of these draft guidelines reads:

*3.3. Consequences of the non-validity of a reservation*

A reservation formulated in spite of the express or implicit prohibition arising from the provisions of the treaty or from its incompatibility with the object and the purpose of the treaty is not valid, without there being any need to distinguish between these two grounds for invalidity.

*3.3.1 Non-validity of reservations and responsibility*

The formulation of an invalid reservation produces its effects within the framework of the law of treaties. It shall not, in itself, engage the responsibility of the State or international organization which has formulated it.

[171] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 104. See also para. 6 above.

[172] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 157.

[173] The text of these draft guidelines, as proposed by the Special Rapporteur in his tenth report on reservations to treaties (A/CN.4/558/Add.2, paras. 195-208), reads:

*3.3.2 Nullity of invalid reservations*

A reservation that does not fulfil the conditions for validity laid down in guideline 3.1 is null and void.

*3.3.3 Effect of unilateral acceptance of an invalid reservation*

Acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation.

*3.3.4 Effect of collective acceptance of an invalid reservation*

A reservation that is explicitly or implicitly prohibited by the treaty or which is incompatible with its object and purpose, may be formulated by a State or an international organization if none of the other contracting parties object to it after having been expressly consulted by the depositary.

During such consultation, the depositary shall draw the attention of the signatory States and international organizations and of the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, to the nature of legal problems raised by the reservation.

[174] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 157.

validity or non-validity of a reservation; it merely addresses the issue of whether the basic conditions for the validity of reservations have been met. This is consistent with the underlying logic of the entire Guide to Practice: before the legal regime of a reservation can be considered, it must be determined whether a unilateral statement constitutes a reservation. In order for it to do so, the statement must be consistent with the definition provided in article 2, paragraph 1 (d), of the Vienna Conventions, as specified and supplemented in part I of the Guide to Practice. Only after the reservation has been classified is it possible to assess the validity of its form — the subject of part II of the Guide to Practice — and content — the subject of part III of the Guide. The legal effects of a reservation may be determined only subsequently and, moreover, depend not only on its validity but on the reactions of other States and international organizations.

86. The substantive validity of reservations is determined primarily by article 19 of the Vienna Conventions. For this reason, draft guideline 3.1 (Permissible reservations)[175] reproduces, verbatim, the provisions of article 19 of the 1986 Vienna Convention. The purpose of draft guidelines 3.1.1 to 3.1.13 is to set forth the conditions for substantive validity that are listed in this key provision of the reservations regime derived from the Vienna Conventions.

87. Draft guideline 3.1.1 (Reservations expressly prohibited by the treaty)[176] explains the meaning of the words "prohibited by the treaty" and specifies the meaning of article 19 (a) of the Vienna Conventions.

88. Draft guideline 3.1.2 (on specified reservations)[177] explains the concept of *specified* reservations, mentioned in article 19 (b) of the Vienna Conventions. Where a treaty expressly allows only specified reservations to be made — or formulated,[178] in the case of specified reservations for which the content is not made explicit in the treaty[179] — any other reservation that does not meet the criteria established by the treaty is considered to be prohibited.

89. While draft guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty)[180] does not establish a directly operational definition of the concept of the "object and purpose of the treaty", it does indicate when, as a general rule, a reservation should be considered as contrary to the object and purpose of the treaty and attempts to clarify the wording of article 19 (c) of the Vienna Conventions. This occurs when a reservation has the potential to "affect an essential element of the treaty that is necessary to its general thrust, in such a way that the reservation impairs the raison d'être of the treaty".

90. Nevertheless, the draft guideline does not establish a solid criterion for determining whether a reservation is incompatible with the object and purpose of the treaty. Therefore, it seems appropriate to provide further clarification of the

[175] For the text of this draft guideline and the commentaries thereon, see *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 327-333.

[176] Ibid., pp. 333-340.

[177] Ibid., pp. 340-350.

[178] See para. 93 below.

[179] Cf. draft guideline 3.1.4 and the commentary thereon (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 354-356).

[180] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), pp. 66-77.

manner in which the object and purpose of a treaty should be determined and to illustrate this methodology through specific examples.[181]

91. Draft guideline 3.1.6 (Determination of the object and purpose of the treaty)[182] performs the first of these functions by establishing the method to be followed in determining the object and purpose of a treaty.

92. The role and function of draft guidelines 3.1.7 (Vague or general reservations),[183] 3.1.8 (Reservations to a provision reflecting a customary norm),[184] 3.1.9 (Reservations contrary to a rule of *jus cogens*),[185] 3.1.10 (Reservations to provisions relating to non-derogable rights),[186] 3.1.11 (Reservations relating to internal law),[187] 3.1.12 (Reservations to general human rights treaties)[188] and 3.1.13 (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty)[189] are to provide specific examples of reservations that for one reason or another (as explained in these draft guidelines) may be considered incompatible with the object and purpose of the treaty in question. These reasons may concern either the nature of the treaty or the specific provision to which the reservation refers, or the characteristics of the reservation itself (for example, its vague or general formulation or the fact that it relates to unspecified rules of domestic law).

93. In addition, draft guideline 3.1.3 (Permissibility of reservations not prohibited by the treaty) states that even where the treaty prohibits certain reservations, reservations which are not prohibited by the treaty must nevertheless be consistent with the object and purpose of the treaty. Draft guideline 3.1.4 (Permissibility of specified reservations) contains a similar rule for specified reservations where their content is not specified in the treaty. Such reservations must also meet the criterion established in article 19 (c) of the Vienna Conventions.

## B. Validity of reactions to reservations

94. Unlike the case of reservations, the Vienna Conventions do not set forth any criteria or conditions for the substantive validity of reactions to reservations, although they deal extensively with acceptances and objections. Such reactions do not, however, constitute criteria for the validity of a reservation that can be evaluated objectively in accordance with the conditions established in article 19 of the Vienna Conventions. They are a way for States and international organizations to express their point of view regarding the validity of a reservation, but the validity (or non-validity) of a reservation must be evaluated independently of the acceptances or objections to which it gave rise. Moreover, this idea is clearly

[181] Ibid., p. 77, para. 15, of the commentary.
[182] Ibid., pp. 77-82.
[183] Ibid., pp. 82-88.
[184] Ibid., pp. 88-98.
[185] Ibid., pp. 99-104.
[186] Ibid., pp. 104-109.
[187] Ibid., pp. 109-113.
[188] Ibid., pp. 113-116.
[189] Ibid., pp. 116-121.

expressed in draft guideline 3.3 (Consequences of the non-validity of a reservation).[190]

95. The *travaux preparatoires* of the Vienna regime in respect of objections leave no doubt as to the lack of connection between the validity of a reservation and the reactions thereto.[191] It also follows that while it may be appropriate to refer to the substantive "validity" of an objection or acceptance, the term does not have the same connotation as in the case of reservations themselves. The main issue is whether the objection or acceptance can produce its full effects.

## 1. Validity of objections

96. In his eleventh report on reservations to treaties, the Special Rapporteur proposed the following wording for draft guideline 2.6.3:

### 2.6.3 Freedom to make objections

A State or an international organization may formulate an objection to a reservation for any reason whatsoever, in accordance with the provisions of the present Guide to Practice.[192]

97. The Commission referred this draft guideline to the Drafting Committee, which nevertheless decided to defer consideration of the matter.[193] Apart from the question of whether objections are a "freedom" or a genuine "right" — which the Drafting Committee could settle — the Committee preferred to wait until the Special Rapporteur submitted a study on the validity of objections before deciding on the final wording of the draft guideline. In other words, the draft guideline must take the issue of validity into account. The eleventh report (which justifies this provision)[194] should therefore be seen as a preface to the study on the issue of the validity of objections.

98. In its 1951 advisory opinion, the International Court of Justice made an analogy between the validity of objections and that of reservations. It considered that:

> The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the

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[190] See above, n. 170.

[191] See the eleventh report on reservations to treaties (A/CN.4/574), paras. 61-66.

[192] Ibid., para. 67.

[193] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 167, n. 286. The Commission also referred draft guideline 2.6.4 (Freedom to oppose the entry into force of the treaty vis-à-vis the author of the reservation), which reads:

*2.6.4 Freedom to oppose the entry into force vis-à-vis the author of the reservation*

A State or international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the reserving State or international organization for any reason whatsoever, in accordance with the provisions of the present Guide to Practice (eleventh report on reservations to treaties (A/CN.4/574), para. 75).

[194] See the eleventh report on reservations to treaties (A/CN.4/574), paras. 60-75.

> appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.[195]

99. This position was endorsed by the Commission in draft article 20, paragraph 2 (b) on the law of treaties, adopted on first reading in 1962. The paragraph provides that:

> An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.[196]

100. In subsequent *travaux*, the Commission and the Vienna Conference removed this requirement that objections to reservations must be compatible with the object and purpose of the treaty.[197] In accordance with the principle of consent that underlies all treaty law, "[n]o State can be bound by contractual obligations it does not consider suitable".[198] Moreover, in its 1951 advisory opinion, the International Court of Justice had stressed that "it is well established that in its trade relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto".[199] In other words, a State may make an objection to any reservation, whether valid or invalid (including as a result of its incompatibility with the object and purpose of the treaty).

101. Does this absence of a link between the validity of a reservation and an objection mean that the substantive validity of objection is no longer an issue? Or is it possible to envisage a situation in which an objection might be incompatible with the object and purpose of the treaty or contrary to a treaty-based prohibition?

102. Regardless of whether the reservation is compatible or incompatible with the object and purpose of the treaty, any objection results, a priori, in exclusion of the

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[195] Advisory opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 24.

[196] *Yearbook ... 1962*, vol. II, p. 176.

[197] See the eleventh report on reservations to treaties (A/CN.4/574), paras. 61 and 62.

[198] Christian Tomuschat, "Admissibility and Legal Effects of Reservations to Multilateral treaties", *Zeitschrift für ausländisches offentlieches Recht und Völkerrecht*, vol. 27, 1967, p. 466; see also the second report on reservations to treaties (A/CN.4/477/Add.1), paras. 97 and 99; and Daniel Müller's commentary on article 20 (1969) in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article* (Brussels, Bruylant, 2006), pp. 809-811, paras. 20-24.

[199] See Advisory Opinion cited in n. 195 above, p. 21. The dissenting judges also stressed this principle in their joint opinion: "The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later" (ibid., pp. 31 and 32). The famous dictum of the Permanent Court of International Justice in the case of the *S.S.* "*Lotus*" confirms this position: "The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed." (*P.C.I.J., Series A*, No. 10, p. 18). The arbitral tribunal that settled the case concerning the *delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* also stressed the importance of the "principle [...] of the mutuality of consent in the conclusion of treaties" (decision of 30 June 1977, *Reports of International Arbitral Awards*, vol. XVIII, p. 40, para. 57).

application of the treaty as a whole (if the author has "clearly" stated that that is its intention) or, as stipulated in article 21, paragraph 3, of the Vienna Conventions, in exclusion of the application of the provision to which the reservation relates. Thus, the purpose and possible effect of any objection is to undermine the integrity of the treaty regime applicable between the author of the reservation and the author of the objection.

103. This does not, however, render the objection invalid. The potential effect of an objection is simply the total or partial deregulation,[200] of the bilateral relations between the author of the objection and the author of the reservation. The author of the objection has merely exercised a right (or freedom)[201] which is recognized under the Vienna Conventions since they expressly establish the possibility of excluding, in this bilateral relationship, the application not only of some provisions, but also of the treaty as a whole. Even if an objection could have the effect of undermining the object and purpose of the treaty by excluding, for example, the application of an essential provision, it should be borne in mind that its author has the *right* (or, in any event, the freedom) to exclude all treaty relations with the author of the reservation. "He who can do more, can do less". While certainly unsatisfactory, this result is nevertheless the corollary of the formulation of the reservation (not that of the objection). It is immediately rectified when the reservation is withdrawn in order to restore the integrity of the treaty relations. A strong case can be made that, even if the reservation has the undesirable effect of depriving the treaty of an essential part of its content in its application as between the reserving State (or international organization) and the objecting State (or international organization), it is better to accept that risk in the hope that the effect will be temporary.

104. This does not prevent the authors of a reservation to which objections have been made from expressing their displeasure. A particularly telling example is the reaction of the United States of America to the objections made by France and Italy in respect of the United States "declaration" regarding the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP).[202] The protest by the United States reads:

> The United States considers that under the clear language of article 10 [of the Agreement], as confirmed by the negotiating history, any State party to the Agreement may file a declaration under that article. The United States therefore considers that the objections of Italy and France and the declarations that those nations will not be bound by the Agreement in their relations with the United States are unwarranted and regrettable. The United States reserves

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[200] In this connection, see Frank Horn, *Reservations and Interpretive Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Studies in International Law, Studies in International Law, The Hague, 1988, pp. 175-176.

[201] See above, para. 97.

[202] In their objections, France and Italy considered that "only European States can formulate the declaration provided for in article 10 with respect to carriage performed in territories situated outside Europe". The two States thus raised "an objection to the declaration by the Government of the United States of America and, consequently, declare[d] that [they would] not be bound by the ATP Agreement in [their] relations with the United States of America" (*Multilateral Treaties Deposited with the Secretary-General*, available online at http://treaties.un.org/, Chap. XI, B 22).

its rights with regard to this matter and proposes that the parties continue to attempt cooperatively to resolve the issue.[203]

It should nevertheless be noted that the author of the protest (reproduced in the United Nations publication, *Status of Multilateral Treaties Deposited with the Secretary-General* under the heading "objections") does not consider that the objections made by France and Italy are invalid, but "only" that they are "unwarranted and regrettable".

105. It is quite clear that if the effect of an objection is to modify the bilateral treaty relations between its author and the author of the reservation in a manner that proves to be contrary to a peremptory norm of international law (*jus cogens*), this result would be unacceptable. Such an eventuality would, however, seem to be impossible: an objection purports only to, and can only, exclude the application of one or more treaty provisions. Such an exclusion cannot "produce" a norm that is incompatible with a *jus cogens* norm. The effect is simply "deregulatory". Ultimately, therefore, the norms applicable as between the author of the reservation and the author of the objection are never different from those that predated the treaty and, unless application of the treaty as a whole is excluded, from treaty-based provisions not affected by the reservation. It is extremely difficult — and, in fact, impossible under these circumstances — to imagine an "objection" that would violate a peremptory norm.

106. Furthermore, when the definition of "objection" was adopted, the Commission refused to take a position on the question of the validity of objections that purport to produce a "super-maximum" effect.[204] These are objections in which the authors determine not only that the reservation is not valid but also that, as a result, the treaty as a whole applies ipso facto in the relations between the two States. The validity of objections with super-maximum effect has frequently been questioned,[205] including by the Special Rapporteur, primarily because the effect of such a statement is not to bar the application of the treaty as a whole or of the provisions to which the reservation refers in the relations between the two Parties but to render the reservation null and void without the consent of its author. This greatly exceeds the consequences of the objections to reservations provided for in article 21, paragraph 3, and article 20, paragraph 4 (b), of the Vienna Conventions. Whereas "unlike reservations, objections express the attitude of a State, not in relation to a rule of law, but in relation to the position adopted by another State", in this case it is the rule itself advocated by the reserving State which is challenged, and this is contrary to the very essence of an objection.[206] It is not, however, the validity of the objection as such that is called into question; the issue raised by this practice is whether the objection is capable of producing the effect intended by its author,[207] and this is far from certain. A State (or an international organization) may well make an objection and wish to give it super-maximum effect, but this does not mean that the objection is capable of producing such an effect, which is not envisaged by the

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[203] *Multilateral Treaties Deposited with the Secretary-General*, available online at http://treaties.un.org/, Chap. XI, B 22.

[204] See para. 24 of the commentary on draft guideline 2.6.1 (Definition of objections to reservations) (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 200).

[205] See the eighth report on reservations to treaties (A/CN.4/535/Add.1), paras. 97-98, and n. 154.

[206] Ibid., para. 97.

[207] See above, para. 95.

Vienna regime. However, as the Commission has acknowledged in its commentary on draft guideline 2.6.1, where the definition of the term "objection" unquestionably includes objections with super-maximum effect:

> The Commission has endeavoured to take a completely neutral position with regard to the validity of the effects [and not of the objection] that the author of the objection intends its objection to produce. This is a matter to be taken up in the consideration of the effects of objections.[208]

107. The same is true in the case of objections with "intermediate effect",[209] through which a State or international organization "expresses the intention to be associated with the author of the reservation but considers that the exclusion of treaty relations should go beyond what is provided for in article 21, paragraph 3, of the Vienna Conventions".[210]

108. While treaty practice provides relatively few specific examples of intermediate-effect or "extensive" objections, some do exist. It would seem, however, that this "*nueva generación*" ("new generation")[211] of objections grew up exclusively around reservations to the 1969 Vienna Convention itself. The reservations formulated by a number of States in respect of article 66 of the Vienna Convention, concerning dispute settlement procedures,[212] caused a number of other States to make objections that were broader in scope than "simple" reservations, but without stating that they did not wish to be associated with the author of the reservation through the treaty. Although a number of States parties to the Vienna Convention made objections to these reservations that were limited to the "presumed" effects envisaged in article 21, paragraph 3, of the 1969 Vienna Convention,[213] other States — Canada,[214] Egypt,[215] Japan,[216] the Netherlands,[217]

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[208] See para. 25 of the commentary on draft guideline 2.6.1 (Definition of objections to reservations) (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 201).

[209] Eighth report on reservations to treaties, A/CN.4/535/Add.1, para. 95. See also the eleventh report on reservations to treaties, A/CN.4/574, footnote 285.

[210] Ibid.

[211] Rosa Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del Régimen de Viena*, Universidad de Murcia, Servicio de Publicaciones, 2004, p. 293.

[212] See the reservations formulated by Algeria (*Multilateral treaties deposited with the Secretary-General*, available online at http://treaties.un.org/, Ch. XXIII, 1), Belarus (ibid.), China (ibid.), Cuba (ibid.), Guatemala (ibid.), the Russian Federation (ibid.), the Syrian Arab Republic (ibid.), Tunisia (ibid.), Ukraine (ibid.) and Viet Nam (ibid.). Bulgaria, the Czech Republic, Hungary and Mongolia had formulated similar reservations but withdrew them in the early 1990s (ibid.). The Democratic German Republic had also formulated a reservation excluding the application of article 66 (ibid.).

[213] This is the case with Denmark and Germany (ibid.).

[214] In respect of the reservation by the Syrian Arab Republic (ibid.).

[215] Egypt's objection is directed not at one reservation in particular, but at any reservation that excludes the application of article 66 (ibid.).

[216] In respect of any reservation that excludes the application of article 66 or the annex to the Vienna Convention (ibid.).

[217] In respect of all States that had formulated reservations concerning the compulsory dispute settlement procedures. This general declaration was reiterated separately for each State that had formulated such a reservation (ibid.).

New Zealand,[218] Sweden,[219] the United Kingdom[220] and the United States[221] — intended their objections to produce more serious consequences but did not wish to exclude the entry into force of the Vienna Convention as between themselves and the reserving States.[222] Indeed, these States not only wanted to exclude the application of the obligatory dispute settlement provision or provisions "to which the reservation refers"; they also do not consider themselves bound by the substantive provisions to which the dispute settlement procedure or procedures apply in their bilateral relations with the reserving State. For example, the United States, in its objection to Tunisia's reservation to article 66 (a) of the Vienna Convention, states that:

> the United States Government intends, at such time as it becomes a party to the Convention, to reaffirm its objection [...] and declare that it will not consider that Article 53 or 64 of the Convention is in force between the United States of America and Tunisia.[223]

109. Such limitations on treaty relations between the reserving State and the objecting State are not envisaged in the wording of the Vienna Convention and the legal basis for such an intermediate effect of an objection is not clearly established either in the Vienna Convention, which does not provide for it, or in doctrine. Some authors propose to consider that "these extended objections are, in fact, reservations (limited *ratione personae*).[224] This analysis is to some extent supported by the fact that other States have chosen to formulate reservations in the strict sense of the

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[218] In respect of Tunisia's reservation (ibid.).

[219] In respect of any reservation that excludes application of the dispute settlement provisions, in general, and of the reservations made by Cuba, the Syrian Arab Republic and Tunisia, in particular (ibid.).

[220] As provided in its declaration of 5 June 1987 and with the exception of Viet Nam's reservation.

[221] The objections made by the United States were formulated before it became a contracting party and concern the reservations made by the Syrian Arab Republic, Tunisia and Cuba (ibid.).

[222] The United Kingdom made maximum-effect objections, in due and proper form, to the reservations formulated by the Syrian Arab Republic and Tunisia. The effect of these objections seems, however, to have been mitigated a posteriori by the United Kingdom's declaration of 5 June 1987, which constitutes in a sense the partial withdrawal of its earlier objection (see draft guideline 2.7.7 and the commentary thereon (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 237-240), since the author does not oppose the entry into force of the Convention as between the United Kingdom and a State that has made a reservation to article 66 or to the annex to the Vienna Convention and excludes only the application of part V in their treaty relations. This declaration, which the United Kingdom recalled in 1989 (with regard to Algeria's reservation) and 1999 (with regard to Cuba's reservation), states that "[w]ith respect to any other reservation the intention of which is to exclude the application, in whole or in part, of the provisions of article 66, to which the United Kingdom has already objected or which is made after the reservation by [the USSR], the United Kingdom will not consider its treaty relations with the State which has formulated or will formulate such a reservation as including those provisions of Part V of the Convention with regard to which the application of article 66 is rejected by the reservation." (ibid.) Nevertheless, in 2002, the United Kingdom again objected to the maximum-effect reservation made by Viet Nam by excluding all treaty relations with Viet Nam (ibid.). New Zealand also chose to give its objection to the Syrian reservation maximum effect (ibid.).

[223] Ibid.

[224] See, inter alia, J. Sztucki, "Some Questions Arising from Reservations to the Vienna Convention on the Law of Treaties", *German Yearbook of International Law*, 1977, p. 297. The author suggests that such declarations should be viewed as "objections only to the initial reservations and own reservations of the objecting States in the remaining part" (ibid., p. 291).

word in order to achieve the same result.[225] Thus, Belgium formulated a (late) reservation concerning the Vienna Convention, stating that

> The Belgian State will not be bound by articles 53 and 64 of the Convention with regard to any party which, in formulating a reservation concerning article 66 (2), objects to the settlement procedure established by this article.[226]

110. On this issue, Professor Gaya has written:

> As a partial rejection modifies the content of the treaty in relation to the reserving State to an extent that exceeds the intended effect of the reservation, acceptance or acquiescence on the part of the reserving State appear to be necessary for a partial rejection to take its effect; failing this, no relations under the treaty are established between the reserving State and an objecting State which partially rejects those relations.[227]

111. If we agree with this way of breaking down objections with intermediate effect, the logical conclusion is that they should meet the requirements for the substantive and formal validity of reservations; they would be "counter-reservations".

112. However, this approach seems debatable. It must be borne in mind that, like any objection, objections with intermediate effect are made in reaction to a reservation formulated by another State. They typically do not arise until after the objecting State has become a party to the treaty, which, generally speaking, prevents it from formulating a reservation within the time period established in the Vienna Conventions and reproduced in draft guideline 1.1 of the Guide to Practice.[228] A contracting State that wished to react to a reservation through an objection of intermediate effect would inevitably be faced with the uncertainties that characterize the regime of late reservations. This is, moreover, true of Belgium's reservation:[229] a simple objection on the grounds of the reservation's lateness would have sufficed for it to be deemed invalid as to form and without effect. Thus, the State that formulated the initial reservation would have had little difficulty in convincing other States; it would merely have had to formulate a (simple) objection in order to prevent the reservation from having effect.

113. Only the formulation of a "preventive" reservation in place of an anticipated "objection", as in the case of the reservation formulated by Tanzania upon accession

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[225] Belgium's reservation quoted below is quite similar in spirit, purpose and technique to the conditional objections envisaged in draft guideline 2.6.14. See, inter alia, Chile's objection to the 1969 Vienna Convention, quoted in the commentary on draft guideline 2.6.14 (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 218, para. 2).

[226] *Multilateral Treaties Deposited with the Secretary-General*, available online at http://treaties.un.org/, Ch. XXIII, 1.

[227] "Unruly Treaty Reservations", in *Le Droit international à l'heure de sa codification. Études en l'honneur de Roberto Ago*, Milan, A. Giuffrè, 1987, p. 326. See also Roberto Baratta, *Gli effetti delle riserve ai trattati* (Milan, Giuffrè, 1999), p. 385.

[228] *Yearbook ... 1998*, vol. II (Part Two), pp. 99-100. See also draft guideline 1.1.2, ibid., pp. 103-104.

[229] See above, para. 109.

to the Vienna Convention in 1976,[230] remains possible and appears capable of producing the desired result. It is, however, quite often difficult for States to anticipate, when expressing their consent to be bound by a treaty, all possible reservations and to evaluate their potential effects in order to formulate a preventive "counter-reservation" at that time.[231]

114. Thus, there can be no question of simply equating objections with intermediate effect to reservations; to do so would seriously undermine the principle of consent.[232] Furthermore, the Commission has already agreed that these are indeed objections, not reservations; the definition of "objection" in draft guideline 2.6.1[233] clearly establishes that not only unilateral declarations that purport to exclude the legal effects of the reservation or treaty as a whole, but also those that purport to "modify the legal effects of the reservation", constitute objections. This wording has been incorporated into the definition of "objection" specifically in order to reflect the actual practice in respect of objections with intermediate effect.[234] Except in the context of a "reservations dialogue", which can become complicated, the reserving State is not, in principle, in a position to respond effectively to such objections.

115. It should be noted that while the 1969 and 1986 Vienna Conventions do not expressly authorize these objections with intermediate effect, they not prohibit them. On the contrary, objections with intermediate effect, as their name indicates, may be entertained in that they fall midway between the two extremes envisaged under the Vienna regime: they purport to prohibit the application of the treaty to an extent greater than a minimum-effect objection (article 21, paragraph 3, of the Vienna Conventions), but less than a maximum-effect objection (article 20, paragraph 4 (b) of the Vienna Conventions).[235]

116. It would, however, be unacceptable for States and international organizations to use a reservation as an excuse for attaching intermediate-effect objections of their choosing, thereby excluding any provision that they do not like. A look back at the origins of objections with intermediate effect would be edifying.

117. This practice has been resorted to mainly, if not exclusively, in the case of reservations and objections to the provisions of part V of the 1969 Vienna Convention and makes clear the reasons which led objecting States to seek to, in a sense, to expend the intended effects of their objections. Article 66 of the Vienna Convention and its annex relating to compulsory conciliation provide procedural guarantees which many States, at the time when the Convention was adopted,

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[230] Tanzania's reservation states: "Article 66 of the Convention shall not be applied to the United Republic of Tanzania by any State which enters a reservation on any provision of Part B or the whole of that part of the Convention" (*Multilateral Treaties Deposited with the Secretary-General*, available online (http://treaties.un.org/, Ch. XXIII, 1).

[231] On that issue, see Frank Horn, op. cit. n. 200, p. 179.

[232] See n. 198 *supra*.

[233] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), pp. 187-203.

[234] Ibid. (p. 200, para. 23 of the commentary on draft guideline 2.6.1). See also *Official Records of the General Assembly Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 293 (d).

[235] Daniel Müller's commentary on article 21 in Oliver Corten and Pierre Klein (eds.), op. cit. n. 198, pp. 925 and 926, paras. 67-69.

considered essential in order to prevent abuse of other provisions of part V.[236] This link was stressed by some of the States that formulated objections with intermediate effect in respect of reservations to article 66. For example:

> The Kingdom of the Netherlands is of the view that the provisions regarding the settlement of disputes, as laid down in article 66 of the Convention, are an important part of the Convention and cannot be separated from the substantive rules with which they are connected.[237]

The United Kingdom stated even more explicitly that

> Article 66 provides in certain circumstances for the compulsory settlement of disputes by the International Court of Justice (...) or by a conciliation procedure (...). These provisions are inextricably linked with the provisions of Part V to which they relate. Their inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference.[238]

Thus, the reaction of several States to reservations to article 66 of the 1969 Vienna Convention was aimed at safeguarding the package deal which some States had sought to undermine through reservations and which could only be restored through an objection that went beyond the "normal" effects of the reservations envisaged by the Vienna Conventions.[239]

118. It is therefore clear from the practice concerning objections with intermediate effect that there is an intrinsic link between the provision which gave rise to the reservation and the provisions whose legal effect is affected by the objection. However, this is not a condition for the validity of the objection. On the one hand, there is no evidence that this is a "practice accepted as law". On the other hand, it would be contradictory to make objections with intermediate effect subject to conditions of validity while maximum-effect objections are not subject to such conditions. Indeed, determination and assessment of the necessary link between the provisions which could potentially be deprived of legal effect by the interaction between a reservation and a broad objection has more to do with the question of whether the objection with intermediate effect can produce the effect intended by its author. It is one thing to say that an objection with intermediate effect is not valid and quite another to maintain that such an objection cannot produce the effect intended by its author. Thus, the issue does not bear on the validity of an objection and should therefore be included not in the part of the Guide to Practice on the substantive validity of declarations in respect of treaties, but rather in the part dealing with the effects that an objection with intermediate effect can actually produce.

119. It follows from the foregoing that a State or organization has the right (or the freedom) to formulate an objection without this right (or freedom) being subject to conditions for substantive validity, as in the case of reservations. While some of the

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[236] Jerzy Sztucki, "Some Questions Arising from Reservations to the Vienna Convention on the Law of Treaties", *German Yearbook of International Law*, vol. 20, 1977, pp. 286 and 287 (see also the references provided by the author).

[237] See above, n. 219.

[238] United Kingdom, objection of 5 June 1987 in respect of a Soviet reservation to article 66 of the Vienna Convention; see above, n. 220.

[239] Daniel Müller, Commentary on article 21, op. cit. n. 198, pp. 927-928, para. 70.

intended effects of an objection may appear undesirable — as, for example, the lack of any treaty-based relations between the author of the reservation and the author of the objection — this is simply a logical consequence of the principle of consent. It is the author of the reservation, not the reaction of the other contracting parties, that challenges the integrity of the treaty. As the International Court of Justice noted:

> It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement.[240]

120. Furthermore, it should be reiterated that one who has initially accepted a reservation to an objection may no longer properly formulate an objection thereto. While this condition may be understood as a condition for the substantive validity of an objection, it may also be viewed as a question of form or of formulation. Thus, draft guideline 2.8.12, of which the Commission took note in 2008[241] and which it is expected to finalize in 2009, provides:

**2.8.12 Final nature of acceptance of a reservation**

Acceptance of a reservation cannot be withdrawn or amended.

There would seem to be no need to revisit this issue.

**2. Validity of acceptances**

121. With regard to acceptance, and in light of the Commission's earlier work on the validity of reservations, it also seems unnecessary to address the issue of the validity of acceptances of a reservation.

122. It seems clear that contracting States or international organizations can freely accept a reservation that is valid and that the validity of such acceptances cannot be questioned. However, at least on the face of it, such is not the case where a State or international organization accepts a reservation that is substantively non-valid.

123. While acceptance cannot determine the validity of a reservation,[242] commentators have argued that:

> An acceptance of an inadmissible reservation is theoretically not possible. Directly or indirectly prohibited reservations under article 19 (1) (a) and (b) cannot be accepted by any confronted state. Such reservations and acceptances of these will not have any legal effects. (...) Similarly, an incompatible reservation under article 19 (1) (c) should be regarded as incapable of acceptance and as *eo ipso* invalid and without any legal effect.[243]

124. The Special Rapporteur shares this view. It does not follow, however, that acceptance of a non-valid reservation is ipso facto invalid. It seems more accurate to state that it simply cannot produce the legal effects intended by its author, not because of the non-validity of the acceptance but because of the non-validity of the reservation. The acceptance itself may not be characterized as valid or non-valid. In his tenth report on reservations to treaties, the Special Rapporteur has already

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[240] Advisory opinion, op. cit., n. 195.

[241] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 77.

[242] See above, paras. 94-95.

[243] Frank Horn, op. cit., n. 200, p. 121.

maintained that "acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation",[244] but the issue in that case is not the validity of the acceptance, but that of the reservation.

> The aim of this draft guideline is not to determine the effects of acceptance of a reservation by a State, but simply to establish that, if the reservation in question is invalid, it remains null even if it is accepted. This observation accords with article 21, which envisages the effects of reservations only if they are "established" in accordance not only with articles 20 and 23 of the Vienna Conventions but also, explicitly, with article 19. Furthermore, the principle established in draft guideline 3.3.3 is in line with the provisions of article 20; in particular, it does not exclude the possibility that acceptance may have other effects, in particular, of allowing the entry into force of the treaty with regard to the reserving State or international organization.[245]

The response to the question as to the conditions under which, in these circumstances, a treaty may enter into force for the author of the reservation and what the content of its treaty obligations would then be is in no way affected by the acceptance; it is solely dependent on the validity of the reservation and on the effects that its author intended it to produce.

125. Furthermore, to argue that no acceptance of a non-invalid reservation may, in turn, be considered valid would prevent the contracting parties from collectively accepting such a reservation. Yet "it can be argued that the Parties always have a right to amend the treaty by general agreement inter se in accordance with article 39 of the Vienna Convention and that nothing prevents them from adopting unanimous agreement to that end on the subject of reservations".[246]

126. Moreover, in light of the presumption contained in article 20, paragraph 5, of the Vienna Conventions, States or international organizations which have remained silent on a reservation, whether valid or not,[247] are deemed to have "accepted" the reservation. If every acceptance were subject to conditions of validity, it would have to be concluded that the tacit acceptance that these States or international organizations are presumed to have expressed was not valid, which is absurd.[248]

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[244] Draft guideline 3.3.3 (Effect of unilateral acceptance of an invalid reservation), proposed in the tenth report (A/CN.4/558/Add.2, para. 202).

[245] Ibid., para. 203.

[246] Ibid., para. 205 (footnotes omitted). In this regard, see D.W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Yearbook of International Law*, 1995, pp. 56-57; and Lilly Sucharipa-Behrman, "The Legal Effects of Reservations to Multilateral Treaties", *Austrian Review of International and European Law*, vol. 1, 1996, p. 78. This is also the position of Derek W. Bowett, but he considers that the possibility does not come under the law of reservations ("Reservations to Non-Restricted Multilateral Treaties", *British Yearbook of International Law, 1976-1977*, p. 84); see also Catherine Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties", *British Yearbook of International Law*, vol. 67, 1993, p. 269.

[247] See, however, the position of Georgio Gaja, who contends that article 20, paragraph 5 — and, indeed, all of articles 20 and 21 of the Vienna Convention — are applicable only to valid reservations ("Il regime della Convenzione di Vienna concernente le riserve inammissibili", in *Studi in onore di Vincenzo Starace* (Naples, Ed. Scientifica, 2008), pp. 349-361.

[248] It could no doubt be argued that article 20, paragraph 5, does not apply to non-valid reservations (cf. Georgio Gaja, op. cit., n. 247), but how can such non-invalidity be determined ex ante?

### 3. Conclusions regarding reactions to reservations

127. In light of the above, it is clear that, as in the case of objections, the Vienna Conventions do not establish conditions for the substantive validity of acceptances and that it would be unwise to speak of the substantive validity of reactions to reservations, regardless of whether the latter are valid. Should the Commission deem it necessary to adopt a draft guideline to that effect, which strikes the Special Rapporteur as unnecessary,[249] it might read:

**3.4[250] Substantive validity of acceptances and objections**

Acceptances of reservations and objections to reservations are not subject to any condition of substantive validity.

## C. Validity of interpretative declarations

128. The Vienna Conventions do not contain any rule on interpretative declarations as such, or, of course, on the conditions for the validity of such unilateral declarations. From that point of view, and from many others as well, they are distinct from reservations and cannot simply be equated with them.

129. The definition of "interpretative declarations" provided in draft guideline 1.2 (Definition of interpretative declarations) is also limited to identifying the practice in positive terms:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.[251]

However, this definition, as noted in the commentary, "in no way prejudges the validity or the effect of such declarations and (...) the same precautions taken with respect to reservations must be applied to interpretative declarations: the proposed definition is without prejudice to the permissibility and the effects of such declarations from the standpoint of the rules applicable to them".[252] The term "permissibility", used in 1999, should now be understood, as in the case of reservations, to mean "validity", a word which, in the view of the Commission,[253] seems, in all cases, to be more appropriate.

130. There is, however, still some question as to whether an interpretative declaration can be valid, a question that is clearly different from that of whether a unilateral statement constitutes an interpretative declaration or a reservation. Indeed, it is one thing to determine whether a unilateral statement "purports to specify or

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[249] Its adoption would nevertheless have the "pedagogical" advantage of justifying the inclusion in the Guide to Practice of commentaries corresponding to the elements of subsection A above.

[250] The numbering of the draft guidelines proposed in this report continues from the numbering used previously; since it has been suggested that some of the previously adopted draft guidelines should be moved from part III to part IV (see paras. 83 and 84 above), the Drafting Committee would have to renumber the draft guidelines contained in part III of the Guide to Practice.

[251] *Yearbook ... 1999*, vol. II, Part Two, p. 97.

[252] Ibid., p. 103 (para. 33 of the commentary).

[253] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 345.

clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions" — which corresponds to the definition of "interpretative declarations" — and another to determine whether the interpretation proposed therein is valid, or, in other words, whether the "meaning or scope attributed by the declarant to a treaty or to certain of its provisions" is valid.

131. The issue of the validity of interpretative declarations can doubtless be addressed in the treaty itself;[254] while this is not very common in practice, it is still a possibility. Thus, a treaty's prohibition of any interpretative declaration would invalidate any declaration that purported to "specify or clarify the meaning or scope" of the treaty or certain of its provisions. Article XV.3 of the 2001 Canada-Costa Rica Free Trade Agreement[255] is an example of such a provision. Other examples exist outside the realm of bilateral treaties. The third draft agreement for the Free Trade Area of the Americas (FTAA) of November 2003, though still in the drafting stage, states in Chapter XXIV, draft article 4:

> This Agreement shall not be subject to reservations [or unilateral interpretative declarations] at the moment of its ratification.[256]

132. It is also conceivable that a treaty might merely prohibit the formulation of certain interpretative declarations to certain of its provisions. To the Special Rapporteur's knowledge, no multilateral treaty contains such a prohibition in this form. But treaty practice includes more general prohibitions which, without expressly prohibiting a particular declaration, limit the parties' capacity to interpret the treaty in one way or another. It follows that if the treaty is not to be interpreted in a certain manner, interpretative declarations proposing the prohibited interpretation are invalid. The European Charter for Regional or Minority Languages of 5 November 1992 includes examples of such prohibition clauses; article 4, paragraph 4, states:

> Nothing in this Charter shall be construed as limiting or derogating from any of the rights guaranteed by the European Convention on Human Rights.

And article 5 states:

> Nothing in this Charter may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of States.

Similarly, articles 21 and 22 of the Framework Convention for the Protection of National Minorities of 1 February 1995 also limits the potential to interpret the Convention:

> Article 21
>
> Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the

[254] Monika Heymann, op. cit., n. 148, p. 114.

[255] Article XV.3 — Reservations: "This Agreement shall not be subject to unilateral reservations or unilateral interpretative declarations" (see: http://www.sice.oas.org/Trade/cancr/English/text3_e.asp).

[256] See the FTAA website, http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp; the square brackets are original to the text.

fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.

Article 22

Nothing in the present framework Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party.

133. With the exception of treaty-based prohibitions of unilateral interpretative declarations, it would seem impossible to identify any other criterion for the substantive validity of an interpretative declaration. By definition, such declarations do not purport to modify the legal effects of the treaty, but only to specify or clarify them.[257]

134. If, on the contrary, the effect of an "interpretative declaration" is to undermine the legal effect of one of the provisions of the treaty or of the treaty as a whole, it is not an interpretative declaration but a reservation which should be treated as such and should therefore meet the conditions for the substantive (and formal) validity of reservations.

135. The Court of Arbitration that settled the dispute between France and the United Kingdom concerning the delimitation of the continental shelf in the *Mer d'Iroise* case confirmed this approach. In that case, the United Kingdom maintained that France's third reservation to article 6 of the Geneva Convention on the Continental Shelf was merely an interpretative declaration and subsequently rejected this interpretation on the grounds that it could not be invoked against the United Kingdom. The Court rejected this argument and considered that France's declaration was not simply an interpretation; it had the effect of modifying the scope of application of article 6 and was therefore a reservation, as France had maintained:

> This condition, according to its terms, appears to go beyond mere interpretation; for it makes the application of that régime dependent on acceptance by the other State of the French Republic's designation of the named areas as involving "special circumstances" regardless of the validity or otherwise of that designation under Article 6. Article 2 (1) (*d*) of the Vienna Convention on the Law of Treaties, which both Parties accept as correctly defining a "reservation", provides that it means "a unilateral statement, however phrased or named, made by a State ... whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in its application to that State". This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude or modify the *legal effect* of certain provisions in their application to the reserving State. This is precisely what appears to the Court to be the purport of the French third reservation and it,

[257] *Yearbook ... 1998*, vol. II, Part Two, p. 100 (para. 16 of the commentary on draft guideline 1.2.). See also the famous dictum of the International Court of Justice in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 18 July 1950, I.C.J. Reports 1950*, p. 229; and the 27 August 1952 judgement of the Court in *Rights of Nationals of the United States of America in Morocco (France v. the United States of America), I.C.J. Reports 1952*, p. 196.

accordingly, concludes that this "reservation" is to be considered a "reservation" rather than an "interpretative declaration".[258]

136. While States often maintain or suggest that an interpretation proposed by another State is incompatible with the object and purpose of the relevant treaty,[259] an interpretative declaration, by definition, cannot be contrary to the treaty or to its object or purpose. Where this is not the case the statement is, in fact, a reservation, as noted in many States' reactions to "interpretative declarations".[260] Spain's reaction to the "declaration" formulated by Pakistan in signing the 1966 International Covenant on Economic, Social and Cultural Rights also demonstrates the different stages of thought in cases where the proposed "interpretation" is really a modification of the treaty that is contrary to its object and purpose. The term "declaration" must first be defined; only then will it be possible to apply to it conditions for substantive validity (of reservations):

> The Government of the Kingdom of Spain has examined the Declaration made by the Government of the Islamic Republic of Pakistan on 3 November 2004 on signature of the International Covenant on Economic, Social and Cultural Rights, of 16 December 1966.
>
> The Government of the Kingdom of Spain points out that regardless of what it may be called, a unilateral declaration made by a State for the purpose of excluding or changing the legal effects of certain provisions of a treaty as it applies to that State constitutes a reservation.
>
> The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan, which seeks to subject the application of the provisions of the Covenant to the provisions of the constitution of the Islamic Republic of Pakistan is a reservation which seeks to limit the legal effects of the Covenant as it applies to the Islamic Republic of Pakistan. A reservation that includes a general reference to national law without specifying its contents does not make it possible to determine clearly the extent to which the Islamic Republic of Pakistan has accepted the obligations of the Covenant and, consequently, creates doubts as to the

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[258] Arbitral award of 30 June 1977, Reports of International Arbitral Awards, vol. XVIII, p. 40, para. 55 (emphasis added by the tribunal).

[259] See, for example, Germany's reactions to Poland's interpretative declaration to the European Convention on Extradition of 13 December 1957 (European Treaty Series No. 24 (http://conventions.coe.int)) and to India's declaration interpreting article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (*Multilateral Treaties Deposited with the Secretary-General*, available online at http://treaties.un.org/, Ch. IV, 3 and 4).

[260] In addition to the aforementioned example of Spain's reservation, see Austria's objection to the "interpretative declaration" formulated by Pakistan in respect of the 1997 International Convention for the Suppression of Terrorist Bombings and the comparable reactions of Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States of America (*Multilateral Treaties Deposited with the Secretary-General*, available online at http://treaties.un.org/, Ch. XVIII, 9). See also the reactions of Germany and the Netherlands to Malaysia's unilateral statement (ibid.) and the reactions of Finland, Germany, the Netherlands and Sweden to the "interpretative declaration" formulated by Uruguay in respect of the Statute of the International Criminal Court (ibid., Ch. XVIII, 10. For other examples of reclassifications, see the thirteenth report on reservations to treaties (A/CN.4/600), para. 301.

> commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant.
>
> The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan to the effect that it subjects its obligations under the International Covenant on Economic, Social and Cultural Rights to the provisions of its constitution is a reservation and that that reservation is incompatible with the object and purpose of the Covenant.
>
> According to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a treaty are not permissible.
>
> Consequently, the Government of the Kingdom of Spain objects to the reservation made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights.
>
> This objection shall not preclude the entry into force of the Covenant between the Kingdom of Spain and the Islamic Republic of Pakistan.[261]

137. Therefore, the issue is not the "validity" of interpretative declarations. These unilateral statements are, in reality, nothing more than reservations and will be treated as such, including with respect to their substantive and formal validity. The European Court of Human Rights followed that reasoning in its judgment in the case of *Belilos v. Switzerland*. Having reclassified Switzerland's declaration as a reservation, it applied the conditions for substantive validity of the European Convention on Human Rights:

> In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content. In the present case, it appears that Switzerland meant to remove certain categories of proceedings from the ambit of Article 6 § 1 (art. 6-1) and to secure itself against an interpretation of that Article (art. 6-1) which it considered to be too broad. However, the Court must see to it that the obligations arising under the Convention are not subject to restrictions which would not satisfy the requirements of Article 64 (art. 64) as regards reservations. Accordingly, it will examine the validity of the interpretative declaration in question, as in the case of a reservation, in the context of this provision.[262]

138. It would therefore seem wise to specify in a draft guideline that any unilateral statement, which purports to be an interpretative declaration but which in fact constitutes a reservation is subject to the conditions for the validity of a reservation.

### 3.5.1 Conditions of validity applicable to unilateral statements which constitute reservations

The validity of a unilateral statement which purports to be an interpretative declaration but which constitutes a reservation must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.15.

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[261] *Multilateral Treaties Deposited with the Secretary-General*, available online at http://treaties.un.org/, Chap. IV, 3.

[262] Judgment, 29 April 1988, *Series A*, vol. 132, para. 49, p. 18.

139. But it must still be determined whether a true interpretative declaration, which purports to explain the meaning of the treaty or of its provisions, can be valid or invalid where the treaty is silent.[263]

140. It goes without saying that an interpretation may be held to be with or without merit although, in absolute terms, it is difficult to determine whether the author is right or wrong until a competent body rules on the interpretation of the treaty. Interpretation remains an eminently subjective process and it is rare that a legal provision, or a treaty as a whole, can be interpreted in only one way. "The interpretation of documents is to some extent an art, not an exact science".[264]

141. As Kelsen has noted:

> If "interpretation" is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, then the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame. The interpretation of a statute, therefore, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value ...[265]

Jean Combacau and Serge Sur consider that:

> The process of interpretation [in international law] is, in fact, only occasionally centralized, either through a judicial body or in some other way. Competence to interpret lies with all subjects and, individually, with each one of them. The resulting proliferation of forms of interpretation is only partially compensated for by their hierarchy. Unilateral interpretations are, in principle, of equal value, and the agreed forms are optional and consequently unpredictable. However, the practical difficulties must not be overestimated. It is not so much a question of an essential flaw in international law as an aspect of its nature, which guides it in its entirety towards an ongoing negotiation that can be rationalized and channelled using the rules currently in force.[266]

142. Thus, it is accepted that "on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to which it is party".[267] If States have the right to interpret treaties unilaterally, they must also have the right to let their point of view be known as regards the interpretation of a treaty or of certain of its provisions.

143. International law does not, however, provide any criterion allowing for a definitive determination of whether a given interpretation has merit. There are, of course, methods of interpretation (see, initially, articles 31 to 33 of the Vienna Conventions), but they are only guidelines as to the ways of finding the "right"

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[263] For cases in which a treaty excludes certain interpretations, see paras. 131 and 132 above.

[264] *Yearbook ... 1966*, vol. II, p. 218, para. 4. See also Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed., Cambridge and New York, Cambridge University Press, 2007, p. 230.

[265] Hans Kelsen, *Pure Theory of Law*, tr. Max Knight, Berkeley and Los Angeles, University of California Press, 1967, p. 351.

[266] Jean Combacau and Serge Sur, *Droit international public*, 8th ed., Paris, Montchrestien, 2008, p. 171.

[267] Patrick Daillier and Alain Pellet, *Droit international public*, 7th ed., Paris, L.G.D.J., 2002, p. 254. See also Charles Rousseau, *Droit international public*, vol. I, *Introduction et Sources*, Paris, Sirey, 1970, p. 250.

interpretation; they do not offer a final test of whether the interpretation has merit. Thus, article 31, paragraph 1, of the Vienna Conventions specifies that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*". This specification is in no way a criterion for merit, and still less a condition for the validity of the interpretations of the treaty, but a means of deriving *one* interpretation. That is all.

144. In international law, the value of an interpretation is assessed not on the basis of its content, but of its authority. It is not the "right" interpretation that wins out, but the one that was given either by all the parties to the treaty — in which case it is called an "authentic" interpretation — or by a body empowered to interpret the treaty in a manner that is binding on the parties. In that regard, the instructive 1923 opinion of the Permanent Court of International Justice in the *Jaworzina* case is noteworthy. Although the Court was convinced that the interpretation reached by the Conference of Ambassadors lacked merit, it did not approach the problem as a question of validity, but rather of opposability. The Court stated:

> And even leaving out of the question the principles governing the authoritative interpretation of legal documents, it is obvious that the opinion of the authors of a document cannot be endowed with a decisive value when that opinion has been formulated after the drafting of that document and conflicts with the opinion which they expressed at that time. There are still stronger grounds for refusing to recognize the authority of such an opinion when, as in the present case, a period of more than two years has elapsed between the day on which it was expressed and the day on which the decision to be interpreted was itself adopted.[268]

145. International law in general and treaty law in particular do not impose conditions for the validity of interpretation in general and of interpretative declarations in particular. It has only the notion of the opposability of an interpretation or an interpretative declaration which, as far as it is concerned, comes into full play in the context of determination of the effects of an interpretative declaration. In the absence of any condition for validity, "[e]infache Interpretationserklärungen sind damit grundsätzlich zulässig" ["simple interpretative declarations are therefore, in principle, admissible"][269] (translated for the report), although this does not mean that it is appropriate to speak of validity or non-validity unless the treaty itself sets the criterion.[270]

146. Thus, Monika Heymann therefore was right in stating:

> Das Völkerrecht kennt keine Schranken für die Abgabe einfacher Interpretationserklärungen, da Verträge unabhängig von dem völkerrechtlichen Rang ihrer Bestimmungen grundsätzlich dezentral ausgelegt werden, für die Dauer ihrer Existenz angewandt und somit auch ausgelegt werden müssen. Grenzen für die Zulässigkeit einfacher Interpretationserklärungen können sich somit nur aus dem jeweiligen völkerrechtlichen Vertrag selbst ergeben. Dass heißt, eine einfache Interpretationserklärung ist nur dann verboten oder

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[268] Advisory opinion of 6 December 1923, *P.C.I.J., Series B*, No. 8, p. 38.
[269] Monika Heymann, op. cit., n. 148, p. 113.
[270] See above, paras. 131-132.

unterliegt zeitlichen Schranken, wenn das jeweilige Abkommen solche Sonderregeln vorsieht.[271]

[International law knows no limits to the formulation of a simple interpretative declaration since treaties, regardless of the hierarchical place of their provisions in international law, are in principle interpreted in a decentralized manner and, for the entire period of their existence, must be applied and consequently interpreted. Thus, restrictions on the admissibility of simple interpretative declarations may only derive from the treaty itself. This means that a simple interpretative declaration is not prohibited, or that its formulation is not time-limited, unless the treaty in question contains special rules in that regard (translated for the report).]

147. In light of these remarks, the Special Rapporteur thinks that it would be useful to include in the Guide to Practice a guideline highlighting the lack of conditions for the substantive validity of an interpretative declaration unless, of course, the treaty provides otherwise. Such a guideline could be based on article 19 of the Vienna Conventions, which is reflected in draft article 3.1 (Permissible reservations), in so far as paragraphs (a) and (b) of the draft guidelines cover the explicit or implicit prohibition of certain reservations by the treaty itself. This idea could be transposed to the case of interpretative declarations.

148. To the Special Rapporteur's knowledge, however, no treaty expressly authorizes "specified" interpretative declarations with a meaning corresponding to that of "specified reservations".[272] While this possibility cannot be entirely ruled out, it is difficult to imagine the purpose of such a clause or how it could be worded. Thus, in light of its transposition to interpretative declarations, the wording of draft guideline 3.3 could be simplified and might simply state that the treaty-based prohibition on formulating an interpretative declaration may be express or implicit (as, for example, in the case of a treaty that permits interpretative declarations to only some of its provisions).

### 3.5 Substantive validity of interpretative declarations

A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is expressly or implicitly prohibited by the treaty.

149. It should also be stressed that draft guideline 3.3 does not include the temporal limitations on the formulation of reservations contained in article 19 of the Vienna Conventions, which draft guideline 3.1 simply reproduces in accordance with the Commission's consistent practice. There is no such limitation in respect of

[271] Monika Heymann, op. cit., n. 148, p. 116.

[272] See draft guidelines 3.1.2 (Definition of specified reservations) and 3.1.4 (Validity of specified reservations) and the commentaries thereon (*Official Documents of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 340-350 and 354-356).

interpretative declarations, as the Commission has noted elsewhere.[273] It is therefore unnecessary to mention it again in draft guideline 3.3.

150. Ultimately, determining the validity of interpretative declarations is infinitely more complex than in the case of reservations. A treaty-based prohibition on formulating interpretative declarations should not raise major assessment issues. A guideline specifying the rules to be followed in such cases seems unnecessary.

## D. Validity of reactions to interpretative declarations (approval, opposition or reclassification)

151. The question of the validity of reactions to interpretative declarations — approval, opposition or reclassification — must be considered in light of the study of the validity of interpretative declarations themselves. Since any State, on the basis of its sovereign right to interpret the treaties to which it is a party, has the right to make interpretative declarations, there seems little doubt that the other contracting parties also have the right to react to these interpretative declarations without any potential for assessment of the "validity" of their reactions.

### 1. Validity of approval

152. In approving an interpretative declaration, the author expresses agreement with the interpretation proposed and, in so doing, conveys its own point of view regarding the interpretation of the treaty or of some of its provisions. Thus, a State or international organization which formulates an approval does exactly the same thing as the author of the interpretative declaration.[274] It is difficult to see how this reaction could be subject to different conditions of validity than those applicable to the initial act.

153. Furthermore, the relationship between an interpretation and its acceptance is mentioned in article 31, paragraph 3 (a), of the Vienna Conventions, which speak of "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".[275]

154. Logically, where the interpretative declaration itself is non-valid owing to a treaty-based prohibition, the approval will have no effect and there will be no need to declare it invalid. Without prejudice to the issue of the effects of an interpretative

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[273] In that regard, see draft guideline 2.4.3:
*2.4.3 Time at which an interpretative declaration may be formulated*
Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7], and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.
(*Yearbook ... 2001*, vol. II, Part Two, pp. 192-193. See also *Yearbook ... 1999*, vol. II, Part Two, p. 101, paras. 21 and 22 of the commentary on draft guideline 1.2).

[274] See the thirteenth report on reservations to treaties (A/CN.4/600), paras. 284-287; see also Monika Heymann's position (op. cit., n. 148, pp. 119-123).

[275] See also the thirteenth report on reservations to treaties (A/CN.4/600), para. 285. This issue was the subject of a discussion between the parties during the oral arguments in the *Dispute regarding Navigational and Related Rights*, when Costa Rica maintained that two identical interpretations in the same language by the parties constituted such an agreement (CR 2009/2 (2 March 2009), pp. 56-57, paras. 47-48 (Mr. Kohen)). Nicaragua contested this position (CR 2009/4 (5 March 2009), p. 56, paras. 28-29 (A. Pellet)); at the time when this report was written, the Court had not yet issued a judgment in the case.

declaration, it seems clear that no subsequent agreement within the meaning of article 31, paragraph 3 (a), of the Vienna Conventions can be established. Furthermore, the treaty-based prohibition deprives individual interpretations by States of all authority.

155. The question of whether the interpretation proposed by the author of the interpretative declaration, on the one hand, and accepted by the author of the approval, on the other, is the "right" interpretation and, as such, is capable of producing the effects desired by the key players in relation both to themselves and to other parties to the treaty[276] is, however, different from that of the validity of the declaration and the approval.[277] The first of these questions cannot be resolved until the effects of interpretative declarations are considered.

### 2. Validity of oppositions

156. The validity of a negative reaction — an opposition — is no more predicated upon respect for any specific criteria than is that of interpretative declarations or approvals.

157. This conclusion is particularly evident in the case of opposition expressed through the formulation of an interpretation different from the one initially proposed by the author of the interpretative declaration.[278] There is no reason to subject such a "counter-interpretative declaration", which simply proposes an alternate interpretation of the treaty or of some of its provisions, to stricter criteria and conditions for validity than the initial interpretative declaration. While it is clear that in the event of a conflict, only one of the two interpretations, at best,[279] could prevail, both interpretations should be presumed valid unless, at some point, it becomes clear to the key players that one interpretation has prevailed. In any event, the question of whether one of them, or neither of them, actually expresses the "correct" interpretation of the treaty is a different matter and has no impact on the validity of such declarations.[280]

158. This is also true in the case of a simple opposition, where the author merely expresses its refusal of the interpretation proposed in an interpretative declaration without proposing another interpretation that it considers more "correct". Such oppositions are certainly not subject to any condition of validity. The position expressed by the author of an opposition may prove ineffective, particularly when the interpretation proposed in the interpretative declaration proves to be the most "correct", but this does not call the validity of the opposition into question and concerns only its possible effects.

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[276] This question must be considered, in particular, in the context of article 41 of the Vienna Conventions (Agreements to modify multilateral treaties between certain of the parties only).

[277] See paras. 140-144 above.

[278] See draft guideline 2.9.2 in the thirteenth report on reservations to treaties (A/CN.4/600), para. 291.

[279] In fact, it is not impossible that a third party might not agree with neither of the interpretations proposed individually and unilaterally by the parties to the treaty if, through the application of methods of interpretation, it concludes that another interpretation arises from the provisions of the treaty. See, for example, *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment of 27 August 1952, *I.C.J. Reports* 1952, p. 211.

[280] See above, paras. 140-144.

### 3. Validity of reclassifications

159. The question of the validity of reclassifications of interpretative declarations must be approached from a slightly different angle. In the case of a reclassification, the author does not call into question[281] the content of the initial declaration, but rather its legal nature and the regime applicable to it.[282]

160. It must be borne in mind that the question of whether to use the term "reservation" or "interpretative declaration" must be determined objectively, taking into account the criteria that the Commission set forth in draft guidelines 1.3 and 1.3.1 to 1.3.3. Draft guideline 1.3 states:

> The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.[283]

The "objective" test takes into account only the declaration's potential effects on the treaty as intended by its author. In other words:

> "only an analysis of the potential — and objective — effects of the statement can determine the purpose sought. In determining the legal nature of a statement formulated in connection with a treaty, the decisive criterion lies in the effective result that implementing the statement has (or would have). If it modifies or excludes the legal effect of the treaty or certain of its provisions, it is a reservation "however phrased or named"; if the statement simply clarifies the meaning or scope that its author attributes to the treaty or certain of its provisions, it is an interpretative declaration".[284]

161. Without prejudice to the Commission's future position on the effects of these unilateral statements, it is clear that they are an important factor in determining the legal nature of the initially formulated act: in order to determine whether such statements constitute interpretative declarations or reservations, they must be taken into account as expressing the position of parties to a treaty on the nature of the "interpretative declaration" or "reservation", with all the consequences that this entails. Nevertheless, the author of a reclassification is simply expressing its opinion on this matter. That opinion may prove to be justified or unjustified when the test of draft guideline 1.3 is applied, but this in no way implies that the reclassification is valid or invalid; once again, these are two different questions.

162. Furthermore, the reclassification is, in itself, simply an interpretation of the "interpretative declaration" itself. As noted above, it is impossible to assess the validity of such an interpretation.[285] Except where the treaty itself prohibits an interpretation, international law establishes only the methods of interpretation, not the conditions of validity.

163. Furthermore, reclassifications, whether justified or unjustified in their use of the term "interpretative declaration" or "reservation", are not subject to criteria for

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[281] It may *simultaneously* call into question and object to the content of the reclassified declaration by making an objection to it; in such cases, however, the reclassification and the objection remain conceptually different from one another; see the thirteenth report on reservations to treaties (A/CN.4/600), paras. 304 and 305.

[282] Ibid., para. 300.

[283] For the draft guideline and the commentary thereon, see *Yearbook ... 1999*, vol. II, Part Two, p. 107.

[284] Ibid., loc. cit., para. 3 of the commentary on draft guideline 1.3.1.

[285] See above, paras. 140-144.

validity. Abundant State practice[286] shows that contracting parties consider themselves entitled to make such declarations, often in order to ensure the integrity of the treaty or in response to treaty-based prohibitions of reservations.[287]

### 4. Conclusions regarding reactions to interpretative declarations

164. It follows from these considerations that the very idea that the concept of validity applies to reactions to interpretative declarations is unwarranted. While such reactions may prove to be "correct" or "erroneous", this does not imply that they are "valid" or "non-valid".

165. In light of these observations, the Special Rapporteur wonders whether it would be appropriate to include draft guidelines specifying that there are no conditions for the validity of reactions to interpretative declarations; a detailed presentation of the matter could be provided in the commentary on draft guideline 2.9.4.[288] If the Commission deems it useful to include such a draft guideline in the Guide to Practice, it could be worded:

#### 3.6 Substantive validity of an approval, opposition or reclassification

Approval of an interpretative declaration, opposition to an interpretative declaration and reclassification of an interpretative declaration shall not be subject to any conditions for substantive validity.

## E. Validity of conditional interpretative declarations

166. According to the definition contained in draft guideline 1.2.1, a conditional interpretative declaration is:

> a unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof (...).[289]

Thus the key feature of a conditional interpretative declaration is not that it proposes a certain interpretation, but that it constitutes a condition for its author's consent to be bound by the treaty.[290] It is that element of conditionality that brings a conditional interpretative declaration closer to being a reservation.

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[286] See, inter alia, the thirteenth report on reservations to treaties (A/CN.4/600), para. 301.

[287] For a particularly telling example, see the reactions of several States to the Philippines' "interpretative declaration" to the 1982 United Nations Convention on the Law of the Sea (*Multilateral Treaties Deposited with the Secretary-General* (http://treaties.un.org), Ch. XXI, 6).

[288] This draft guideline, proposed by the Special Rapporteur in his thirteenth report on reservations to treaties (A/CN.4/600, para. 323), reads:

*2.9.4 Freedom to formulate an approval, protest or reclassification*

An approval, opposition or reclassification in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting international organization and by any State or any international organization that is entitled to become a party to the treaty.

[289] *Yearbook ... 1999*, vol. II, Part Two, pp. 103-106.

[290] Ibid., p. 105, para. (16) of the commentary.

167. A priori, however, the question of the validity of conditional interpretative declarations seems little different from that of "simple" interpretative declarations and it would seem unwarranted to make formulation of a conditional interpretative declaration subject to conditions for validity other than those applicable to "simple" interpretative declarations.[291] It is clear from the definition of a conditional interpretative declaration that it does not purport to modify the treaty, but merely to interpret one or more of its provisions in a certain manner.

168. The situation changes significantly, however, where the interpretation proposed by the author of a conditional interpretative declaration does not correspond to the interpretation of the treaty established by agreement between the parties. In that case, the condition formulated by the author of the declaration, stating that it does not consider itself to be bound by the treaty in the event of a different interpretation, brings this unilateral statement considerably closer to being a reservation. Frank Horn has stated that:

> If a state does not wish to abandon its interpretation even in the face of a contrary authoritative decision by a court, it may run the risk of violating the treaty when applying its own interpretation. In order to avoid this, it would have to qualify its interpretation as an absolute condition for participation in the treaty. The statement's nature as a reservation is established at the same time the propagated interpretation is established as the incorrect one.[292]

169. Thus, any conditional interpretative declaration potentially constitutes a reservation: a reservation conditional upon a certain interpretation. This can be seen from one particularly clear example of a conditional interpretative declaration; the declaration that the French Republic attached to its expression of consent to be bound by its signature of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) stipulates that:

> In the event that the interpretative declaration thus made by the French Government should be contested wholly or in part by one or more Contracting Parties to the Treaty or to Protocol II, these instruments shall be null and void in relations between the French Republic and the contesting State or States.[293]

In other words, France intends to exclude the application of the treaty in its relations with any States parties that do not accept its interpretation of the treaty, exactly as if it had made a reservation.

170. While this scenario is merely a potential one, it seems clear that the declaration in question is subject to the conditions for substantive validity set out in article 19 of the Vienna Conventions. Although it might be thought prima facie that the author of a conditional interpretative declaration is merely proposing a specific interpretation (not subject to conditions for validity), the effects of such unilateral statements are, in fact, made conditional by their authors upon one or more provisions of the treaty not being interpreted in the desired manner.

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[291] See above, paras. 128-148.

[292] Frank Horn, op. cit., n. 200, p. 326.

[293] This declaration was confirmed in 1974 at the time of ratification (United Nations, *Treaty Series*, vol. 936, p. 419 (No. 9068)).

171. The deliberate decision of the Netherlands to formulate reservations, rather than interpretative declarations, to the International Covenant on Civil and Political Rights clearly shows the considerable similarities between the two approaches:

> The Kingdom of the Netherlands clarif[ies] that although the reservations are partly of an interpretational nature, it has preferred reservations to interpretational declarations in all cases, since if the latter form were used doubt might arise concerning whether the text of the Covenant allows for the interpretation put upon it. By using the reservation form the Kingdom of the Netherlands wishes to ensure in all cases that the relevant obligations arising out of the Covenant will not apply to the Kingdom, or will apply only in the way indicated.[294]

172. A priori, there is therefore no alternative to the application to these conditional interpretative declarations of the same conditions for substantive (and, moreover, formal) validity as those that apply to reservations. The (precautionary) application of the conditions set out in article 19 of the Vienna Conventions is not easy, however, unless it has been established that the interpretation proposed by the author is unwarranted and does not correspond to the authentic interpretation of the treaty. For example, although a treaty may prohibit the formulation of reservations to its provisions, it does not follow that a State cannot subject its consent to be bound by the treaty to a certain interpretation of that treaty. If the interpretation proves to be warranted and in accordance with the authentic interpretation of the treaty, it is a genuine interpretative declaration that must meet the conditions for the validity of interpretative declarations, but only those conditions. If, however, the interpretation does not express the correct meaning of the treaty and is rejected on that account, the author of the "interpretative declaration" does not consider itself bound by the treaty unless the treaty is *modified* in accordance with its wishes. In that case, the "conditional declaration" is indeed a reservation and must meet the corresponding conditions for the validity of reservations.

173. It follows that so long as its status as to correctness has not been, or cannot be, determined, such a conditional interpretative declaration must meet both the conditions for the validity of an interpretative declaration (in the event that the interpretation is ultimately shared by the other parties or established by a competent body) and the conditions for the validity of a reservation (in the event that the proposed interpretation is rejected). So long as the correct interpretation has not been established, the conditional interpretative declaration remains in a legal vacuum and it is impossible to determine whether it is a mere interpretation or a reservation. Either case is still possible.

174. However, the problem remains largely theoretical. Where a treaty prohibits the formulation of interpretative declarations, a conditional interpretative declaration that proposes the "correct" interpretation must logically be considered non-valid, but the result is exactly the same: the interpretation of the author of the declaration is accepted (otherwise, the conditional declaration would not be an interpretative declaration). Thus, the validity or non-validity of the conditional interpretative declaration as an "interpretative declaration" has no practical effect. Whether or not

[294] *Multilateral Treaties Deposited with the Secretary-General*, available online at http://treaties.un.org/, Chap. IV, 4.

it is valid, the proposed interpretation is identical with the authoritative interpretation of the treaty.

175. If, on the other hand, the treaty prohibits reservations, but not interpretative declarations, a conditional interpretative declaration is considered non-valid since it does not meet the conditions for the validity of a reservation. But, here again, if the proposed interpretation is ultimately accepted as the correct and authoritative interpretation, the author of the conditional interpretative declaration has achieved its aim, despite the non-validity of its declaration.

176. The question of whether a conditional interpretative declaration meets the conditions for the validity of an interpretative declaration does not actually affect the interpretation of the treaty. The "interpretation" element is merely the condition that transforms the declaration into a reservation. However, in the event that the conditional interpretative declaration is indeed transformed into a reservation, the question of whether it meets the conditions for the validity of reservations does have a real impact on the content (and even the existence) of treaty relations.

177. In light of these observations, there is no reason to think that conditional interpretative declarations are subject to the same conditions for the validity as "simple" interpretative declarations. Instead, they are subject to the conditions for the validity of reservations, as in the case of conditions for formal validity.[295] The conditional interpretative declaration is in fact a conditional reservation.

### 3.5.2 Conditions for the substantive validity of a conditional interpretative declaration

The validity of a conditional interpretative declaration must be assessed in accordance with the provisions of draft guidelines 3.1 and 3.1.1 to 3.1.15.

178. No specific new provision needs to be adopted, at this stage of the study, regarding the issue of assessment of the validity of conditional interpretative declarations. In light of the observations concerning their validity, it would seem that the issue must be resolved in the same way as that of competence to assess the validity of reservations. In accordance with the Commission's consistent practice regarding these specific interpretative declarations, and pending its final decision as to whether to maintain the distinction — which cannot be made until it has considered the effects of these declarations — the Special Rapporteur proposes the provisional inclusion in the Guide to Practice of a draft guideline consisting of a simple cross-reference to other guidelines, which could be worded:

### 3.5.3 Competence to assess the validity of conditional interpretative declarations

Guidelines 3.2, 3.2.1, 3.2.2, 3.2.3 and 3.2.4 apply, mutatis mutandis, to conditional interpretative declarations.

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[295] See draft guidelines 2.4.5 to 2.4.8 and 2.4.10 (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 502-506; *Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 118-119; and *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 277-288.